Supreme Court, U.S.
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No. 92-1982

In the Supreme Court of the United States

OCTOBER TERM, 1992

HILLCREST MEDICAL CENTER, PETITIONER

v.

RONDA SCRIBNER, RESPONDENT

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

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PETITION FOR A WRIT OF CERTIORARI

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY *
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

Petitioner Hillcrest Medical Center, a not-for-profit community hospital, was held liable for $5 million in punitive damages based on the negligence of its employees. The employees had mistakenly moved the respondent from her room in preparation for an ultrasound actually scheduled for another patient. However, respondent was correctly identified and returned to her room before the ultrasound was performed, and she suffered no permanent impairment from the incident. In addition, there was no evidence that similar misidentification of a patient had ever occurred at Hillcrest in the past.

Nevertheless, a jury awarded respondent $100,000 in compensatory damages and $10 million in punitive damages. The punitive damages were upheld by the Oklahoma trial court after the most cursory review. The state court of appeals then affirmed the judgment on condition of remittitur of $5 million, leaving in place punitive damages of $5 million—50 times larger than the award of compensatory damages. This petition presents two questions:

1. Whether the $5 million punitive damages exaction in this case violates substantive due process because it exceeds any amount that is rationally related to the purposes of punishment and deterrence.

2. Whether the punitive damages determination in this case lacked the procedural safeguards necessary to protect petitioner from a deprivation of its property without due process of law.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Hillcrest Medical Center states that it is incorporated as a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Hillcrest Medical Center's parent corporation is Hillcrest HealthCare Corporation, which also is a not-for-profit organization under Section 501(c)(3). Hillcrest HealthCare Corporation is also the parent corporation of Hillcrest Medical Center Foundation and several other organizations, including for-profit companies. Hillcrest Medical Center has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Hillcrest Medical Center respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Oklahoma in this case.

OPINIONS BELOW

The opinions of the Court of Appeals of the State of Oklahoma (App., *infra*, 1a-20a) and the District Court of Tulsa County (App., *infra*, 21a-23a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. Hillcrest's petition for rehearing was denied on November 6, 1992. The Supreme Court of Oklahoma denied Hillcrest's petition for a writ of certiorari on March 17, 1993. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall * * * deprive any person of * * * property without due process of law * * *.

U.S. CONST. amend. XIV.

Oklahoma's punitive damages statute provides, in pertinent part:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

Okla. Stat. tit. 23, § 9(A) (1987).

STATEMENT

This case involves the imposition of $5 million in punitive damages against petitioner Hillcrest Medical Center, a not-for-profit community hospital, in a medical malpractice action. The day after undergoing a hysterectomy at Hillcrest, respondent Ronda Scribner was mis-

takenly moved from her room to an ultrasound laboratory for testing that was scheduled for another patient. Although Scribner was correctly identified before the ultrasound procedure began and was returned to her room, she alleged that the movement caused an incisional dehiscence (or opening) of sutures that she had received during the hysterectomy. Additional surgery was required to repair the dehiscence.

Scribner suffered no permanent impairment from being mistakenly moved for the ultrasound procedure or from the subsequent surgery. Nevertheless, a jury awarded her $100,000 in compensatory damages—at most $2716 for out-of-pocket expenses and the rest for pain and suffering—and imposed $10 million in punitive damages. Upon review by the court of appeals, the punitive damages were reduced to $5 million. Even after that reduction, however, the $5 million punishment is 50 times greater than the award of compensatory damages and at least 1840 times greater than Scribner's out-of-pocket expenses.

A. The Events Giving Rise to Scribner's Claim

On October 1, 1985, Ronda Scribner underwent a routine and successful hysterectomy at Hillcrest Medical Center. App., *infra*, 3a. Dr. Linda Reza performed the operation. *Ibid.*; Reza Dep. 8.[1] After the surgery, Scribner was placed in Bed B of a semi-private room to recover. App., *infra*, 3a. In the early morning hours of October 2, the patient occupying Bed A in Scribner's room was moved to a different room, but the move was not recorded in the hospital's records. *Ibid.*

Later that morning, an orderly came to Scribner's room seeking the patient who had been in Bed A. App., *infra*, 3a. Thinking that Scribner was that patient, the orderly informed her that he was there to take her to the ultra-

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[1] Dr. Reza's deposition was read into the record at Tr. 551.

sound laboratory for testing. *Id.* at 3a-4a. Scribner told the orderly that she had recently had surgery and was not aware that any ultrasound had been ordered. *Id.* at 4a; Tr. 129-131. Nevertheless, without checking Scribner's identity, the orderly helped Scribner out of bed and into a wheelchair. App., *infra*, 4a; Tr. 132, 143. Scribner testified that this movement caused her to experience severe pain. App., *infra*, 4a; Tr. 500. The orderly then took Scribner to the ultrasound laboratory. App., *infra*, 4a.

When Scribner arrived at the ultrasound laboratory, the ultrasound technologist saw that she had an IV and a catheter, which the correct patient was also supposed to have. Tr. 188-89. The technologist then began to prepare Scribner for the ultrasound by passing water through a catheter into her bladder, causing her to experience cramp-like pain. App., *infra*, 4a. As soon as the technologist noticed Scribner's surgical scar from the hysterectomy, however, she immediately called the nursing station to confirm the procedure. Tr. 193-94. When the technologist used the name of the correct patient in that call, Scribner said, "That's not me." Tr. 194. Realizing then that a mistake had been made, the technologist immediately drained the water from Scribner's bladder, notified her supervisor about the situation, and brought Scribner back to her room without ever performing the ultrasound. App., *infra*, 4a; Tr. 197-98, 266.

Scribner was discharged from the hospital five days later, on October 7, 1985. App., *infra*, 4a; Tr. 515. On October 9, however, she was readmitted to Hillcrest on account of abdominal pain caused by an incisional dehiscence and hernia; a dehiscence (or opening) had occurred in the internal incision from the hysterectomy and a portion of the intestine had protruded through the opening, causing a pouching in the abdomen. App., *infra*, 4a. The dehiscence was surgically repaired by Dr. Reza on October 10 without complication. *Ibid.*; Reza Dep. 11,

34-38; Pltff's Ex. 1 (Operative Report for 10/10/85). Scribner sustained no permanent impairment from the dehiscence or its surgical repair. App., *infra*, 4a; Reza Dep. 80-81.[2]

B. Trial Proceedings

On February 24, 1986, Scribner filed this action against Hillcrest for negligence and assault and battery.[3] Scribner sought actual damages of $307,043. Trial Court's Statement of the Case at 2. No more than $2716 of the actual damages were for out-of-pocket expenses consisting of the cost of the second surgery ($2093) and lost wages ($623); the remainder was for pain and suffering. Tr. 694-98. In addition, Scribner sought punitive damages of up to nearly $108 million—the net worth of the hospital. Trial Court's Statement of the Case at 2.[4]

Hillcrest did not dispute that its employees had been negligent in failing properly to identify Scribner before moving her from her bed and preparing her for an ultrasound. See Trial Court's Statement of the Case at 2. The main issues at trial were whether the movement of Scribner actually caused the dehiscence and whether the negligence amounted to "reckless or wanton disregard" of Scribner's rights so as to permit punitive damages under Oklahoma law. *Ibid.*

The parties' witnesses sharply disagreed on the cause of the dehiscence and incisional hernia. Scribner's ex-

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[2] Scribner's only physical complaint was that when she stretched or was tense, she could feel a small ridge or knot where the permanent sutures were put in to repair the dehiscence. Tr. 508.

[3] Scribner originally sued Dr. Reza as well but voluntarily dismissed her as a defendant. Dismissal Without Prejudice (Nov. 7, 1988).

[4] In his closing argument, however, Scribner's counsel requested that the jury award "eight to ten million dollars" because "if you give $107,000,000 we're going to be back in this courthouse trying this lawsuit again in a couple of years." Tr. 691-92.

perts testified that the dehiscence was caused by straining and pulling that occurred when the orderly assisted Scribner from her bed into the wheelchair. Tr. 315, 361.

Hillcrest's expert, on the other hand, testified that Scribner's movement the day after the hysterectomy could not have caused the dehiscence because it did not exert sufficient force on the incision to affect the suture. Tr. 593. He believed that the dehiscence probably occurred because the suture material had been weakened during the cauterization of the incision at the conclusion of the hysterectomy. Tr. 577-79, 592.

Dr. Reza—who performed both the hysterectomy and the subsequent surgery to repair the dehiscence—also testified that moving Scribner for the ultrasound did not cause the dehiscence. App., *infra*, 5a; Reza Dep. 13. Dr. Reza had instructed that Scribner be ambulatory on the day after the hysterectomy and determined that Scribner's actual movement during the incident did not differ in any way from the type of movement she had directed. *Id.* at 14-15. Dr. Reza concluded that the dehiscence was caused by an abdominal distention resulting from a bowel complication that occurred during Scribner's initial hospitalization. App., *infra*, 5a; Reza Dep. 16, 20.[5]

Before closing arguments, the trial court decided, over Hillcrest's objection (Tr. 673-75), that there was sufficient evidence to lift Oklahoma's statutory cap on punitive damages, which limits punitive damages to the amount of compensatory damages. Okla. Stat. tit. 23, § 9(A) (1987). The Oklahoma punitive damages statute provides that the cap may be lifted if the trial court finds that there is "clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reck-

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[5] Hillcrest's witnesses also testified, without contradiction, that filling Scribner's bladder with sterile water did not cause the dehiscence. Tr. 593-94; Reza Dep. 13-14.

less disregard for the rights of another * * *." *Ibid.*[6] The court found that "the evidence is clear and convincing * * * that there was a lackadaisical attitude towards handling the check procedures for the purpose of identifying a patient" (Tr. 603), even though there was no evidence of any previous misidentification by a Hillcrest employee. On the urging of plaintiff's counsel, the court sought to fit its finding to the statutory requirement by stating that "the lackadaisical attitude would create a reckless and wanton disregard for the rights of the patient." Tr. 605.

In submitting the issue of punitive damages to the jury, the trial court gave the following instruction, which closely followed Oklahoma Uniform Jury Instruction 5.5:

> If you find in favor of the Plaintiff Ronda Scribner and grant her actual damages, and if you find the conduct of the Defendant amounted to a wanton or reckless disregard for the rights of another, then you may, in addition to actual damages, grant exemplary damages in such sum as you reasonably believe will punish and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the Plaintiffs, but as punishment to the Defendants, and as an example to others to deter them from like conduct.

Instruction 22; Tr. 683.[7]

In his closing argument, Scribner's counsel focused almost entirely on punitive damages. He told the jury that

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[6] Oddly, though, once the cap is lifted, the jury is *not* required to find "clear and convincing evidence" of the requisite conduct to impose punitive damages; it applies only a preponderance-of-the-evidence standard. See page 7, *infra*.

[7] The court overruled Hillcrest's objection to this instruction and refused to give Hillcrest's requested instructions on punitive damages, which would have clarified the type of conduct that may give rise to such damages. Tr. 680. See Defendant's Requested Jury Instructions.

it had "unlimited power" to award punitive damages up to $108 million—the net worth of the hospital. Tr. 685-86. Counsel repeatedly argued that a large award was necessary to "send * * * a message" to Hillcrest, which he characterized as a wealthy, uncaring institution:

> Let me tell you something about punitive damages. A rich man won't pay his fines. * * * He'll accumulate his parking fines and violations and once every six months he'll send a hired girl or somebody on the payroll down to pay it. He doesn't go down there. * * * He's not intimidated by these small fines and parking fines, not the rich man, he's not. But we are. We have to pay our fines. * * * If you're going to make a rich man hear you you've got to to [sic] enough in money damages toward him that he hears you irrevocably. * * *
>
> After this trial is over one of two things is going to happen out there in that hospital board room. They're going to have a meeting, board meeting * * * and they're either going to pop open a bottle of champagne or whatever they drink out there and they're going to say boy, this is dandy, we won this one and this is the way to do it. Let's keep it up, boys. We're making money hand over fist. We're bringing in $160,000,000 a year. Let's keep it up. And then you will have said keep it up. We're for you.
>
> Or they are going to stand up and they're going to say listen, we can't do it this way anymore. * * * It just got too high priced.

Tr. 685, 691.

Indeed, counsel even suggested that the absence of Hillcrest's administrators from the trial showed that the hospital held the jurors in disdain and thought nothing of the case:

> I haven't seen the CEO of Hillcrest here, Chief Executive Officer. I haven't seen any members of the Board of Directors. I see a lady over there that's

> a hired hand that they sent down here to take their whipping for them. They're not here. * * * Do you know why they're not here? Because this isn't important to them. * * * They don't think that you citizens off the public street have enough gumption, enough common sense, enough character and enough guts to do something to get their attention.
>
> Well, if you want to talk to the Board of Hillcrest up there and you want to send them a message they'll hear, then you have to find substantial damages in punitive damages in this case. * * * We're not animals in a veterinary clinic, we're people. * * *
>
> These people drag in a $160,000,000 a year and they don't love us. * * * What is the matter with these people? And they are so oblivious out there to you they don't fear you, they don't respect you, they're not even here.

Tr. 685-86, 690-91.

The jury returned a general verdict for Scribner, awarding her $100,000 in actual damages and $10 million in punitive damages. App., *infra*, 5a; Tr. 711-12.

C. Review by the Trial Court

Hillcrest then filed a motion to vacate the punitive damages award, arguing, *inter alia*, that the award violated both procedural and substantive due process.[8] Without holding a hearing, the trial court denied the motion. The court first held that the jury was given sufficient guidance in determining *whether* to award punitive dam-

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[8] See, *e.g.*, Brief in Support of Term Time Motion to Vacate Award of Punitive Damages 4 ("the absence of any meaningful standards or limitations on the unbridled exercise of jury discretion is so lacking in any fundamental fairness as to impose a 'highly penal' sanction upon this defendant without due process of law"); *id.* at 5 ("Based upon these constitutional principles [in the Fifth and Fourteenth Amendments] * * * [t]he award is clearly excessive by any measure. The $10,000,000.00 figure is one hundred times as large as the award of actual damages.").

ages because "[c]onduct necessary for the award is set forth with sufficient precision [in the punitive damages statute] for the jury to make this determination. See 23 O.S. Section 9, 1986; Slocum versus Phillips Petroleum Co., 769 P.2d 146, Okl. 1989, at Page 149 under the syllabus 2 notation." App., *infra*, 21a-22a. The court did not address, however, whether the instruction that was actually given to the jury provided sufficient guidance as to the meaning of the concept "wanton or reckless disregard for the rights of another," the statutory prerequisite to punishment.

The court then held that the jury's discretion regarding the *amount* of punitive damages was sufficiently constrained by the statutory requirement that it award damages "for the sake of example to others and by way of punishing the Defendant." App., *infra*, 22a. Finally, although Hillcrest had raised the issue (see note 8, *supra*), the court did not examine whether the jury's award was so excessive as to violate substantive due process.

D. Review by the Court of Appeals

The Oklahoma Court of Appeals affirmed the judgment on the condition of remittitur of $5 million of the punitive damages award. App., *infra*, 20a. The court rejected Hillcrest's procedural due process arguments, holding that the jury instruction and judicial review of whether the jury's award was " 'grossly excessive' " or " 'influenced by passion, prejudice or sympathy' " provided sufficient procedural safeguards. *Id.* at 10a-14a; see pages 24-26, *infra*. The court did not address Hillcrest's substantive due process arguments.[9] It simply concluded

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[9] Hillcrest had asserted those arguments twice. See Brief in Chief of Appellant Hillcrest Medical Center (No. 75,446) 20, 23 ("The Due Process Clause forbids damages awards that are 'grossly excessive' * * * or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' * * * The amount of the punitive damage award, $10,000,000, is

that the $10 million award "is 'larger than reason dictates to be necessary to deter such conduct,' is 'not properly . . . responsive to the legitimate objective of a punitive damage award,' and is 'so . . . excessive that we cannot in reason allow it to stand.' " App., *infra*, 20a (footnotes omitted). The court therefore directed remittitur of $5 million. *Ibid.* The court did not explain, however, how it had chosen the $5 million figure or why a $5 million punishment would not also be excessive.

REASONS FOR GRANTING THE PETITION

It is hard to imagine a case that better illustrates the phenomenon of punitive damages "run wild." *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The "lackadaisical" conduct of Hillcrest's employees here was hardly the sort of intentional, malicious conduct for which punishment is normally appropriate; it was at most reckless.[10] Moreover, Hillcrest itself was at most negligent; there was *no* evidence that a similar incident had ever occurred at the hospital before or that Hillcrest had any reason to think that its employees were not following the hospital's patient identification procedures. And certainly Hillcrest did not stand to profit from the negligence of its employees.

In addition, respondent did not suffer any lasting physical impairment, and incurred out-of-pocket losses of only

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outrageous and wholly disproportionate to any harm done to the plaintiff or any wrong committed by the defendant.") (citations omitted); Brief in Chief of Appellant Hillcrest Medical Center (No. 76,604) 5-6 ("In the instant case, Oklahoma law does not provide the procedural and substantive protections against excessive and irrational punitive awards deemed essential to due process in *Haslip*. * * * The award * * * clearly crossed th[e] line and penetrated deep into unconstitutional territory.").

[10] Nor did the conduct create a significant probability of harm. An ultrasound is a noninvasive examination procedure that is unlikely to cause injury. The conduct here was hardly at the same level as taking the wrong patient for surgery.

$2716. And the jury's award of $100,000 in compensatory damages amply compensated respondent for pain and suffering she claimed to have endured from the incident.

Despite all this, Hillcrest has been subjected to $5 million in punitive damages—an amount *50* times greater than compensatory damages, and *1840* times greater than respondent's out-of-pocket losses. The gross excessiveness of this punitive exaction runs afoul of substantive due process. Moreover, the utter lack of any meaningful constraint on the jury's discretion over punitive damages—either in the form of adequate guidance in the jury instructions or meaningful trial or appellate court review of the punishment—violates procedural due process.

Two terms ago, in *Pacific Mutual Life Insurance Co.* v. *Haslip, supra,* this Court began the process of defining the substantive and procedural limits that the Due Process Clause places on the imposition of punitive damages. Although the Court upheld the punishment in that case, it noted that the amount of the punitive damages—which was "more than 4 times the amount of compensatory damages, [wa]s more than 200 times the out-of-pocket expenses of [the plaintiff], and, of course, [wa]s much in excess of the fine that could be imposed" for the defendant's conduct—was "close to the line" of "constitutional impropriety." 111 S. Ct. at 1046.

Moreover, in determining that the award in *Haslip* comported with the *procedural* requirements of due process, the Court relied on the three tiers of procedural protections afforded to the defendant in that case: adequate jury instructions and the exclusion of evidence of the defendant's wealth to constrain the jury's initial determination, and *meaningful* trial-court and appellate review of the jury's award. 111 S. Ct. at 1044-46.

Although *Haslip* established that the imposition of punitive damages must be accompanied by reasonable

procedural protections and will violate substantive due process requirements if the amount is excessive in light of the purposes for which punishment is being imposed, it left considerable doubt as to the precise contours of these constitutional protections. Disagreements among the lower courts quickly developed,[11] leading to this Term's grant of certiorari in *TXO Production Corp.* v. *Alliance Resources Corp.*, No. 92-479 (argued March 31, 1993), to address both the procedural and substantive due process issues. This petition should be disposed of as appropriate in light of the decision in *TXO*.[12] In the event there remains a need, after *TXO*, for further elucidation of the constitutional issues associated with punitive dam-

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[11] Regarding substantive due process, compare, *e.g.*, *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991) (stating that if punitive damages 4 times larger than compensatory damages were " 'close to the line' " in *Haslip*, punitive damages nearly 50 times larger than compensatory damages "surely cross[] that line") with *General Motors Corp.* v. *Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992) (holding that "punitive damages need bear no relationship to actual damages," and permitting punitive damages 100 times larger than compensatory damages). Regarding procedural due process, compare, *e.g.*, *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991) (instruction to jury that it should award punitive damages "in such 'sum as you believe' will punish and deter" and judicial review solely for "excessiveness," without standards for determining excessiveness, did not satisfy due process under *Haslip*) with *Wolf* v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (holding that nearly identical instruction and similar standardless review for excessiveness satisfied due process under *Haslip*).

[12] This Court recently granted certiorari in *United Mine Workers* v. *Bagwell*, No. 92-1625 (cert. granted, June 1, 1993), to consider a related issue: "Whether the non-compensatory civil contempt fines of $52 million * * * —analogous to the punitive damages at issue in *TXO* * * * —were so excessive as to violate the Due Process Clause * * *." If the Court does not decide the substantive due process issue in *TXO* and chooses not to hear this case on the merits, this case should be held for consideration in light of the Court's decision in *Bagwell*.

ages, this case affords an excellent vehicle for that undertaking.

I. THE $5 MILLION PUNITIVE DAMAGES AWARD IS SO GROSSLY EXCESSIVE AS TO VIOLATE DUE PROCESS

This Court made clear in *Haslip* that the Due Process Clause places an outer limit on the size of a punitive damages award, although it did not make a clear delineation of that limit. See 111 S. Ct. at 1046 (holding that punitive damages 4 times greater than compensatory damages and 200 times greater than out-of-pocket expenses, though "close to the line, * * * do[] not cross the line into the area of constitutional impropriety"). This ruling was presaged by *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989), which noted the existence of "authority in [the Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme," but declined to address the question whether due process limits a jury's discretion to impose punitive damages because that issue was not raised below. See also *id.* at 280 (Brennan, J., concurring) (joining Court's opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties"); accord, *id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

Unless the Court reverses field entirely in *TXO* and rejects the existence of *any* substantive limit on the amount of punishment that may constitutionally be exacted, the decision below should not be permitted to stand. If the Court accepts TXO's substantive excessiveness claim, the invalidity of the punishment in this case follows *a fortiori*, and the case should be remanded for reconsideration. If, on the other hand, the Court finds

the *TXO* award not constitutionally excessive, we show below that this case is distinguishable in a way that makes it a likely candidate for review on the merits.

In *TXO*, the plaintiffs/respondents did not contest the existence of a substantive limit on the amount of punishment but defended the amount in that case largely on the basis of the ratio between the punitive damages and the potential gain to the defendant from its wrongful conduct. See, *e.g.*, Brief of Respondents at 22-24; Oral Argument Tr. 28-38. The respondents argued that even though the ratio of punitive to compensatory damages was quite large, the punitive damages were not unconstitutionally excessive because they were only 1.2 (or at most 2) times greater than the potential gain to the defendant. Brief of Respondents at 19-20, 22-24; Oral Argument Tr. 28, 31-32.

Here, in contrast, neither Hillcrest—a not-for-profit community hospital—nor its employees stood to profit to any material extent from the employees' negligence. Moreover, any savings that the hospital might have achieved through diminished oversight of employees would be more than offset by expected compensatory damages liability resulting from improper treatment due to misidentification.[13] Thus, the substantive due process

[13] Moreover, the substantial compensatory damages in this case—almost all of which were for pain and suffering—greatly exceed any conceivable "gain" to the hospital from diminished oversight. Those damages therefore were more than sufficient to induce the hospital to take corrective measures. The punitive exaction, on the other hand, will result in over-deterrence, exerting enormous pressure on the hospital to increase monitoring of low-level employees and institute other costly "defensive" measures far beyond any rational level. The cost of such "defensive medicine" inevitably will be reflected either in higher medical bills for consumers or in the curtailment of patient services. See DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 97 (1987) (estimating annual cost of defensive medicine resulting from malpractice suits at $10.6 billion). Given the current crisis in health care costs, the effects of a judgment like this are especially unfortunate.

issue here is not clouded by the "potential gain" factor. This case therefore clearly presents the question whether a punitive damages exaction 50 times greater than the award of compensatory damages, more than 1840 times greater than out-of-pocket expenses, and far, far greater than any fine that might be imposed for similar conduct under the most relevant statutory provisions,[14] violates substantive due proces. Cf. *Haslip*, 111 S. Ct. at 1046.

Furthermore, in contrast to the intentional and malicious oppression allegedly undertaken by the petitioner in *TXO*—which was "part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power," 419 S.E.2d 870, 881 (W. Va. 1992) —the conduct of Hillcrest's employees here *at most* amounted to recklessness, while Hillcrest itself was at most negligent. See App., *infra*, 6a-8a.[15] Thus, in addi-

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[14] We are unaware of any criminal penalties in Oklahoma for medical malpractice. Even the legislatively prescribed penalties for assault and assault-and-battery are minuscule compared to the punitive damages award here: $500 (and/or up to 30 days in jail) for assault; $500 (and or up to 90 days in jail) for assault-and-battery. See Okla. Stat. tit. 21, § 644 (Supp. 1993).

[15] Because Hillcrest was found liable for the actions of its employees on the theory of *respondeat superior*, the court of appeals attributed the employees' alleged recklessness to the hospital. Hillcrest itself, however, was *at most* negligent, because there was no evidence that it knew of, but was indifferent to, its employees' failure to follow the hospital's patient identification procedures, or that any similar misidentification had occurred in the past. Compare *Haslip*, 111 S. Ct. at 1041 (petitioner "had received notice that its agent * * * was engaged in a pattern of fraud identical to those perpetrated against respondents"). Thus, even if the Constitution does not prohibit the imposition of vicarious liability for punitive damages, Hillcrest's lack of knowledge of its employees' failure to follow its identification procedures highlights the unsuitability of the severe punishment in this case. Cf. *Canton* v. *Harris*, 489 U.S. 378, 385-92 (1989) (city may not be held vicariously liable under Section 1983 for failure of its employees to provide necessary medical attention to person in custody, but may be held liable only if it

tion to the high ratio of punitive to compensatory damages, this is a case in which the enormous punitive exaction is out of all proportion to the relatively low degree of "reprehensibility" involved. Cf. *Haslip*, 111 S. Ct. at 1045 (approving Alabama courts' consideration of "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct").

II. THE AWARD VIOLATES PROCEDURAL DUE PROCESS

Haslip made clear that due process requires States to provide procedural protections that establish a "sufficiently definite and meaningful constraint on the discretion of * * * fact finders in awarding punitive damages." 111 S. Ct. at 1045. In that case, the Court held that Alabama's three tiers of procedural protections satisfied due process. Those protections consisted of: (1) adequate guidance to the jury and exclusion of evidence of the defendant's net worth; (2) meaningful and structured review by the trial court; and (3) meaningful and structured review by the state supreme court. *Id.* at 1043-46.

In this case, however, the discretion of the jury—as well as of the reviewing courts—was virtually unlimited. Cf. *Haslip*, 111 S. Ct. at 1043 ("unlimited jury discretion —or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Oklahoma simply has failed to establish any meaningful system to constrain the decisions of its juries or its courts. Depending on the outcome of *TXO*, then, this Court either should grant, vacate, and remand this case for reconsideration or it should grant the petition and decide the procedural due process issue on the merits.

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had deliberate policy or custom of failing to train its employees and that policy or custom caused the injury).

A. The Jury Instructions Failed to Give the Jury Adequate Guidance

In *Haslip*, the Court "carefully reviewed" the jury instructions and held that, although somewhat sparse, the instructions managed to cross the constitutional threshold —at least when considered in light of the regime of meaningful and structured post-verdict judicial review (see pages 22-23, *infra*).[16] The *Haslip* instructions "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing * * *, and explained that their imposition was not compulsory." 111 S. Ct. at 1044.

The Court also stressed that "[a]ny evidence of [the defendant's] wealth was excluded from the trial." 111 S. Ct. at 1044. The jury therefore was "guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045. Thus, although the jury was given "significant discretion," that discretion was "exercised within reasonable constraints" and was not affected by inappropriate information. *Id.* at 1044.

Here, however, the jury's discretion was not similarly constrained as to the questions *whether* to impose punitive damages or *how much* to award. First, the trial court simply told the jury that it could impose punitive damages "if you find the conduct of the Defendant amounted to a wanton or reckless disregard for the rights of another." But, despite Hillcrest's request for additional explanatory instructions (see note 7, *supra*), the court provided no definition of "wanton or reckless disregard." [17]

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[16] We believe that in the absence of this regime of judicial review, the instructions in *Haslip* would have been held constitutionally inadequate. As discussed below (at pages 23-26), Oklahoma lacks such a regime.

[17] Moreover, in contrast to the *Haslip* instruction's repeated emphasis on the non-compulsory nature of punitive damages, see 111

Second, the trial court gave the jury virtually *no* guidance as to how it should determine the amount of punitive damages. It simply stated that the jury should impose whatever sum it "reasonably believe[d] will punish and be an example to others." In *Haslip*, by contrast, the jury was at least instructed to "take into consideration the character and the degree of the wrong and the necessity of preventing similar wrong" in fixing the amount. 111 S. Ct. at 1037 n.1. The jury received no such guidance in this case. This was potentially quite significant given the extraordinarily mild degree of any punishable conduct that could have been found to have occurred in this case. Nor was the jury even told that it should not impose *more* than was necessary to punish and set an example. The jury therefore could just have easily decided to impose $100 million in punitive damages as $10 million—because obviously a $100 million exaction would "punish" and "be an example to others." It apparently chose $10 million only because that is what Scribner's counsel requested in his closing argument. See note 4, *supra*.

The utter lack of adequate jury instructions was sorely exacerbated by the admission of evidence of Hillcrest's net worth. Tr. 635, 648. In the absence of meaningful guidance from the trial court, the jury naturally was left with Hillcrest's net worth as the *sole* determinant of the severity of the punishment. Not surprisingly, then, Hillcrest's net worth became the focus of plaintiff's closing argument, which repeatedly stressed that the jury had "unlimited power" to impose punitive damages up to $108 million—the hospital's net worth—and contended that a large award was necessary to "intimidate[]" the supposedly "rich" non-profit hospital. Tr. 684-85, 690-91. This

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S. Ct. at 1037 n.1, the court here simply told the jury that it "may" impose punishment upon making the requisite statutory finding. In light of the plaintiff's almost exclusive focus on punitive damages during closing argument, the jury could easily have believed that it was *expected* to impose punitive damages.

argument was bolstered by the trial court's instruction that the plaintiff was seeking punitive damages up to the hospital's net worth. Trial Court's Statement of the Case at 2.

The blatant appeal to the jury to penalize Hillcrest on the basis of its net worth was inherently prejudicial. As this Court stated in holding that municipalities are immune from punitive damages under § 1983: "evidence of a tortfeasor's wealth * * * may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981).[18] Indeed, where, as here, the defendant is a large corporation or other institutional entity, evidence of the defendant's "wealth" bears no relation whatsoever to the goals of retribution or deterrence. As stated by a group of prominent legal scholars serving as reporters for the ALI's study of possible revisions of the Restatement of Torts:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity * * *.
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.

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[18] See also *In re Paris Air Crash*, 622 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages [against a wealthy defendant] even when concrete elements of * * * intentional wrongdoing are absent"), cert. denied sub nom. *Kalinsky* v. *General Dynamics Corp.*, 449 U.S. 976 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) (evidence of defendant's wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function"). Accord, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61 (1982).

II AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 254-55 (1991). See also *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992).

The evidence of net worth in this case was also inherently misleading. The net worth of a hospital consists largely of its building and equipment—things like CAT scanners, X-ray machines, laboratories, operating rooms, beds, etc. Tr. 652. These are, of course, illiquid assets that are part and parcel of the hospital's vital operations and are not readily available to pay a monetary judgment.

The evidence of net worth, then, combined with the plaintiff's repeated emphasis on the need to "intimidate[]" the supposedly "rich" hospital by means of an enormous punishment and the lack of any guidance from the trial court on fixing the amount of punitive damages beyond the instruction to impose "such sum as you reasonably believe will punish and be an example to others," virtually guaranteed that the amount of punitive damages was based on nothing more than Hillcrest's net worth. Cf. *Haslip*, 111 S. Ct. at 1045 ("the factfinder must be guided by more than the defendant's net worth"); *id.* at 1066 (O'Connor, J., dissenting) (noting that the amounts of punitive damages awards " 'seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint.' ") (quoting *OKI Am., Inc.* v. *Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)). The instructions in this case therefore failed to provide sufficient constraints on the jury's discretion.

B. Both the Trial Court and Court of Appeals Failed to Conduct Meaningful Review of the Jury's Award

The constitutional inadequacy of the jury instructions was compounded by the lack of meaningful, structured review by either the trial court or the court of appeals.

The absence of meaningful judicial review to check the jury's discretion rendered the imposition of punitive damages in this case violative of procedural due process.

Critical to this Court's decision upholding the award of punitive damages in *Haslip* was Alabama's provision of two tiers of judicial scrutiny of the jury's award "to make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. Under the Alabama procedure, both the trial and appellate courts examine seven "detailed substantive standards" to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Ibid.* Those standards are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Ibid. This Court noted that the application of these standards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries* * * * and in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 * * * (1988)," in which "an amount awarded would be set aside or modified only if it was 'manifestly

and grossly excessive' * * *, or would be considered excessive when 'it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience.' " *Id.* at 1045 n.10.

Moreover, the Court noted that in applying the detailed standards, Alabama trial courts are required to " 'reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' " 111 S. Ct. at 1044. Finally, in addition to applying these standards, the Alabama Supreme Court "undertakes a comparative analysis," comparing the award at issue with awards in other cases. *Id.* at 1045.

In contrast, the judicial review of the award in this case was utterly lacking in objective standards. Unlike Alabama, Oklahoma has not identified any meaningful factors for trial and appellate courts to consider in reviewing punitive damages awards. Rather, like the courts of Vermont and Mississippi, Oklahoma courts will set aside or modify an award only if it is "grossly excessive" and "so out of proportion as to be unconscionable," or is "the result of the jury's passion, prejudice or improper sympathy." *Chandler* v. *Denton,* 741 P.2d 855, 868 (Okla. 1987); accord, *Timmons* v. *Royal Globe Ins. Co.*, 653 P.2d 907, 918-19 (Okla. 1982). The lack of meaningful, objective criteria means that Oklahoma courts can make only ad hoc, intuitive judgments about the propriety of a particular award, "substituting [their] own notion[s] of excessiveness for that of the jury." *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991); see *id.* at 106 (finding that such standardless review is not "meaningful" under *Haslip*).

That is precisely what happened here. Indeed, in this case the trial court not only did not examine objective factors similar to those identified in *Haslip,* but it did not even determine whether the amount of punitive damages

was "grossly excessive" or the result of "passion, prejudice or improper sympathy." The court merely stated that the issue of punitive damages was properly *submitted* to the jury and that the statutory cap was appropriately lifted by the trial court before submission to the jury. App., *infra*, 22a.[19] It undertook no analysis of whether the amount actually imposed by the jury was excessive. Such review, which falls far short of the type of meaningful "on the record" review conducted by the trial court in *Haslip*, fails to provide *any* constraint on the amount of the punishment.

The review of the Oklahoma Court of Appeals was scarcely better. That court did not engage in any "comparative analysis" of the award in relation to awards in similar cases,[20] nor did it apply any "detailed substantive

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[19] The existence of the statutory cap obviously provides no constraint on the jury's discretion once that cap is lifted. Moreover, the fact that the trial court lifted the cap before submitting the case to the jury merely indicates that the trial court found "clear and convincing evidence" that the defendant's conduct met the statutory standard. It obviously does not show that the trial court determined, *ex ante*, that any amount of punitive damages eventually imposed by the jury would be appropriate.

[20] The court did cite three cases in which the Oklahoma Supreme Court had ordered remittitur: *Chandler* v. *Denton*, 741 P.2d 855 (Okla. 1987); *Buzzard* v. *Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991); and *Timmons* v. *Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982). See App., *infra*, 18a-19a. But the court relied on these cases solely for the proposition that it had the authority to direct remittitur if the jury's award was " 'grossly excessive' " or " 'influenced by passion, prejudice or improper sympathy.' " *Id.* at 18a. It did not compare the punitive damages award in this case to the awards in those cases to determine whether this award was excessive. Indeed, if it had done so, it would have recognized that even after remittitur, the award in this case was far in excess of the punitive awards in the cited cases. See *Chandler*, 741 P.2d at 867-68 ($250,000 awarded for *intentional* infliction of emotional distress, invasion of privacy, trespass, and wrongful taking of property, where defendant's conduct was "extreme and outrageous" and plaintiff suffered "severe emotional distress"); *Buzzard*, 824

standards" comparable to those applied by the Alabama Supreme Court in *Haslip*. See 111 S. Ct. at 1045.[21] In-

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P.2d at 1116 ($400,000 awarded for *bad faith* breach of insurance contract); *Timmons*, 653 P.2d at 918-19 ($1.5 million awarded for insurer's *malicious* breach of duty to deal fairly and act in good faith).

[21] In an effort to show that the judicial review in this case was analogous to that of the Alabama courts in *Haslip*, the court of appeals stated that application of the "'grossly excessive'" and "'influenced by passion, prejudice or sympathy'" standards of review "contemplate[s] consideration of the *reasonableness* of the award in relation to, for example, (1) cause and extent of injury, (2) the deterrence objective of punitive damages, (3) the actual damages awarded, (4) net worth of the defendant, and (5) the nature and egregiousness of defendant's conduct." App., *infra*, 13a-14a (footnotes and emphasis omitted). It further stated that "[t]he Trial Court undertook a review of the punitive damage award under the same standards as this appellate court," and that these standards "meet due process safeguards." *Id.* at 14a.

In fact, however, it is quite clear from the trial court's opinion that the trial court never applied any such standards. See App., *infra*, 21a-23a. Moreover, despite its recitation of these standards, the court of appeals itself never discussed them or explained why they permitted a $5 million punishment. It simply concluded that the jury's $10 million punishment was excessive and that $5 million was not. *Id.* at 20a.

Furthermore, in contrast to the Alabama Supreme Court (see *Haslip*, 111 S. Ct. at 1043-44), the Oklahoma Supreme Court has never established a set of standards for trial and appellate courts to consider in reviewing punitive damages. That court, like the court of appeals here, simply makes an ad hoc determination of whether an award is "grossly excessive" or was the result of "passion, prejudice or improper sympathy." See, *e.g.*, *Buzzard*, 824 P.2d at 1116 (stating only that "we believe that the large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated'"); *Chandler*, 741 P.2d at 868 ("When the $500,000 punitive damages award is added to the other amounts recovered, the total verdict becomes so grossly excessive that we cannot in reason allow it to stand."); *Mitchell* v. *Ford Motor Credit Co.*, 688 P.2d 42, 46 (Okla. 1984) (stating merely that the award "was far from excessive when considered in light of the facts adduced and of the [defend-

stead, it simply concluded that the jury's exaction of $10 million " 'is larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated,' is 'not . . . properly responsive to the legitimate objective of a punitive damage award,' and is 'so . . . excessive that we cannot in reason allow it to stand.' " App., *infra*, 20a. As noted above (at page 11), the court never explained *why* it considered the $10 million punishment excessive, or why $5 million—which was still 50 times larger than the compensatory award and more than 1840 times larger than out-of-pocket losses —was not excessive.[22]

Rather than proving a "definite and meaningful constraint" on the jury's award of punitive damages, the court of appeals' decision merely substituted the court's own ad hoc judgment of the proper amount of punishment for the jury's. Despite the fact that the court of appeals reduced the jury's punitive damages award in this case, then, Oklahoma's system of judicial review fails to provide sufficient constraints on juries' discretion in imposing punitive damages to satisfy procedural due process.

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ant's] disclosed net worth"). Finally, even if the vague "considerations" mentioned by the court of appeals were regularly considered by Oklahoma courts, they are hardly analogous to the "detailed substantive standards" applied by the Alabama Supreme Court in *Haslip*.

[22] The court added in a footnote that it was "concerned" that evidence of "indifference" to the risk of injury due to misidentification and counsel's "impassioned argument" combined to " 'create an improper sympathetic response,' " by the jury and "result[ed] in a 'damage award larger than reason dictates.' " App., *infra*, 19a n.45. This comment may explain why the jury imposed such severe punishment. But it fails to explain why the appellate court's $5 million punishment is not itself still irrationally excessive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY *
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

June 1993

APPENDICES

APPENDIX A

RELEASE FOR PUBLICATION BY ORDER
OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. III

Case No. 75,446 cons. w/ Case No. 76,604

RONDA SCRIBNER, APPELLEE

VS.

HILLCREST MEDICAL CENTER, APPELLANT

and

DR. L. KHADEMOL REZA, DEFENDANT

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

HONORABLE ROBERT J. SCOTT, JUDGE

AFFIRMED ON CONDITION

W. Michael Hill
Edward J. Main,
SECREST & HILL,
Oklahoma City, Oklahoma,

Reuben Davis,
Frederic N. Schneider, III,
William C. Kellough,
BOONE, SMITH, DAVIS, HURST & DICKMAN,
Tulsa, Oklahoma,
For Appellant,

W. C. Sellers, Jr.,
W. C. "BILL" SELLERS, INC.,
Oklahoma City, Oklahoma,
For Appellee,

James L. Hall, Jr.,
Clyde A. Muchmore,
Harvey D. Ellis, Jr.,
CROWE & DUNLEVY,
Oklahoma City, Oklahoma,
For Amici Curiae VHA of Oklahoma, Inc.,
and American Hospital Association,

Page Dobson,
Ronald R. Hudson,
Elizabeth J. Dunning,
HOLLOWAY, DOBSON, HUDSON & BACHMAN,
Oklahoma City, Oklahoma,
For Amicus Curiae
Oklahoma Hospital Association,

Andrew L. Frey,
Michael A. Vatis,
MAYER, BROWN & PLATT,
Washington, D.C.,

Fredric J. Entin,
James A. Henderson,
Margaret J. Hardy,
American Hospital Association,
Chicago, Illinois,
For Amicus Curiae
American Hospital Association.

Memorandum Opinion by Robert L. Bailey, Presiding Judge:

In principal case No. 75,446, Appellant Hillcrest Medical Center (Hospital) seeks review of judgment entered on jury verdict awarding $100,000.00 in actual damages and $10,000,000.00 in punitive damages to Appellee Ronda Scribner (Patient) in Patient's medical negligence action. In consolidated Case No. 76,604, Hospital seeks review of the Trial Court's order denying Hospital's post-trial motion to vacate the judgment for punitive damages. In the principal appeal, Hospital alleges (1) failure of Patient's proof of causation, (2) error in instruction of the jury on the theory of res ipsa loquitur, (3) under several propositions, error in instruction and submission of the issue of punitive damages to the jury, and (4) excessiveness of the punitive damage award. In the consolidated action, Hospital asserts error of the Trial Court in denying Hospital's motion to vacate the punitive damage award, arguing unconstitutionality of Oklahoma's punitive damage statute, and again arguing excessiveness of the punitive damage award. Amici Curiae join in the attack on the award of punitive damages.

Patient underwent an apparently uncomplicated hysterectomy at Hospital under the surgical care of Defendant Dr. Reza on October 1, 1985, and Hospital placed Patient in Bed B of a semi-private room to recover. Hospital moved the patient occupying Bed A of the same room elsewhere in the facility in the early morning hours of October 2 but Hospital staff failed to note the move in its records.[1]

Later on the morning of October 2, within twenty-two hours of surgery, an orderly seeking the Bed A patient appeared in Patient's room [2] and announced his intention

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[1] Two shifts of nurses failed to note the move of the patient in the adjoining bed.

[2] Notwithstanding having treated the Bed A patient in her new room, nursing staff directed the orderly the Patient's room to find the Bed A patient.

to take Patient to the ultrasound laboratory for testing. Patient protested that she had just come from surgery, had been instructed not to move without direction, and that she knew of no scheduled test. Nevertheless, the orderly persisted, and without checking Patient's identity,[3] the orderly lifted Patient from her bed, Bed B, to place her in a wheelchair. Patient testified she then felt excruciating pain and nearly passed out. The orderly proceeded to take Patient to the ultrasound lab.

At the ultrasound laboratory, technicians there noticed Patient's weakened condition and obvious pain. Notwithstanding, and without checking Patient's identity, the technicians commenced the ultrasound procedure by introduction of cold water through a catheter into Patient's bladder. Patient testified she experienced a wave of cramp-like pain as a result. At that point, upon further remonstrations by Patient, the laboratory technicians determined Patient's true identity, discontinued the ultrasound procedure, and returned Patient to her room. The technicians, however, failed to notify Patient's attending Nurse of the mistake.[4]

Patient discharged from Hospital about a week after surgery. However, two days later, Patient suffered an incisional dehiscence[5] and hernia, necessitating further surgery, although Patient apparently sustained little or no permanent impairment as a result of the second surgery.

At trial, Patient presented testimony of the orderly that he ignored Patient's protests, that he did not check

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[3] Patient wore a traditional hospital identification bracelet, and Patient's bed bore her name.

[4] Only after confrontation by Patient's doctor was a notation of the mistake entered in Patient's records.

[5] "A bursting open, splitting, or gaping along natural or sutured lines." Stedman's Medical Dictionary, 25th Ed. (Williams and Wilkens, 1990).

Patient's identification before taking her to the ultrasound laboratory, and demonstrating the orderly's ignornance of hospital procedures for patient identification. Patient also presented expert testimony tending to show causation of the incisional dehiscence attributable to strain and pulling during Patient's mistaken trip to the ultrasound laboratory. Patient also showed Hospital's net worth approaching $110,000,000.00

Hospital presented testimony of other experts contradicting Patient's evidence of causation. Defendant Dr. Reza testified that abdominal distension suffered by Patient during the initial hospitalization caused a suture to tear, resulting in the incisional dehiscence and hernia. Dr. Reza denied causal connection between the abandoned ultrasound procedure and the incisional dehiscence.

Based on the evidence, the Trial Court found Patient had clearly showed Hospital's "lackadaisical attitude" toward patient identification procedures, evincing "a reckless and wanton disregard of the rights of" Patient so as to potentially allow an award of punitive damages in excess of actual damages determined.[6] The Trial Court then instructed the jury on the issue of punitive damages over objection of Hospital.

The jury returned its verdict for Patient, awarding $100,000.00 in actual damages, and $10,000,000.00 in punitive damages. Hospital appealed judgment entered on jury verdict for Patient in principal Case No. 75,446. Hospital subsequently moved to vacate the award of punitives, which the Trial Court denied. Hospital appealed the order denying the motion to vacate in Case No. 76,604, and the matters have been consolidated for resolution.

We address Hospital's attack on Patient's proof of causation first. On this issue, Hospital asserts incom-

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[6] 23 O.S. Supp. 1986 § 9.

petency of Patient's expert testimony attributing causation of the incisional dehiscence to the strain and movement of the mistaken trip to the ultrasound laboratory as unsupported in medical literature [7] and contrary to all other expert testimony offered at trial. By this argument, however, Hospital in essence urges this Court to re-weigh the evidence of Patient's otherwise qualified experts, which we may not and will not do.[8] We therefore reject this allegation of error.

Next, Hospital attacks the award of punitive damages. In its first subproposition, Hospital argues the issue should not have been presented to the jury at all. In other words, while the conduct complained-of might be negligent, such conduct does not evince evil intent, the functional equivalent of such intent, or a conscious and knowing disregard of Patient's rights by Hospital so as to justify submission of the issue of punitive damages to the jury. In its related second subproposition, Hospital argues the complained-of conduct did not rise to the requisite level of culpability to justify lifting the punitive damages "cap" imposed by statute, that is, that the punitive damages award cannot exceed the amount of actual damages awarded.

An award of punitive damages is controlled by statute which provides:

> A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reck-

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[7] See, e.g., *Downs v. Longfellow Corp.*, 351 P.2d 999 (Okl. 1960) (weight of opinion no greater than reasons given in support thereof; opinion without rational basis has no probative force).

[8] See, *Leeper v. Thorton*, 344 P.2d 1101 (Okl. 1959) (where expert allowed to testify as such, soundness of his opinions, conclusions and deductions go to weight of testimony, not admissibility, and weight accorded such testimony for determination of trier of fact).

> less disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing defendant, and the percentage limitation on such damages set forth in this section shall not apply.
>
> B. The provisions of this section shall be strictly construed.

23 O.S. Supp. 1986 § 9.

A party may be held liable for punitive damages under the "wanton or reckless disregard" standard if the party is shown to be "aware of, or culpably indifferent to, unnecessary risk of injury." [9]

In the instant case, Patient presented evidence showing Hospital's adoption of policies for patient identification, supporting at least an inference that Hospital recognized the risk of injury to patients due to misidentification. Patient also presented evidence clearly demonstrating ignorance of or failure to adhere to the patient identification policies by Hospital nurses, the orderly, and laboratory technicians. The Trial Court found Patient's evidence of Hospital's indifference to its own patient identification

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[9] *Thiry v. Armstrong World Industries*, 661 P.2d 515, 518 (Okl. 1983).

procedures clearly and convincingly [10] supported a finding of conduct equivalent to "reckless disregard for the rights of another" warranting both submission of the issue of punitive damages to the jury [11] and lifting the statutory "cap" on punitive damages. We agree with the Trial Court's assessment of the evidence and reject these allegations of error.

In its third subproposition attacking the punitive damages award, Hospital urges error in the Trial Court's instruction to the jury concerning punitive damages [12] as (1) impermissibly deviating from the punitive damage instruction prescribed by the Oklahoma Uniform Jury Instructions—Civil [13] and (2) lacking direction to the

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[10] "Clear and convincing" evidence is that which supports a conclusion free from serious or substantial doubt of correctness. Black's Law Dictionary (5th Ed., West, 1979).

[11] *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 918 (Okl. 1982) (person may commit such wilful acts in reckless disregard of another's rights that malice may be inferred). See also, e.g., *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42 (Okl. 1984) (reckless disregard); *Dilworth v. Fortier*, 405 P.2d 38 (Okl. 1965) (gross negligence or reckless disregard).

[12] The Trial Court's instruction provided:

> If you find in favor of [Patient] and grant her actual damages, and if you find the conduct of [Hospital] amounted to a wanton or reckless disregard for the rights of another, then you may, in addition to actual damages, grant exemplary damages in such sum as you reasonably believe will punish and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the [Patient], but as a punishment to the Defendants, and as an example to others to deter them like conduct.

[13] The Oklahoma Uniform Instruction on punitive damages provides:

> If you find in favor of Plaintiff (name), and grant him actual damages, and if you find the conduct of Defendant, (name), (was or amounted to):

jury on Patient's "heightened" burden of proof of entitlement thereto. In this subproposition, Hospital asserts that the statutory mandate requiring the Trial Court to find "clear and convincing" evidence of sufficiently egregious conduct as a condition to lifting the punitive damages "cap" requires Patient to adduce "clear and convincing" evidence of such conduct to justify an award of punitive damages, and Hospital maintains the Trial Court erred in failing to so instruct. In a separate proposition, Hospital also attacks the Trial Court's instruction to the jury on the theory of res ipsa loquitur.

As to the Trial Court's instruction regarding punitive damages, we first note the Trial Court's instruction is nearly identical to the OUJI instruction, the Trial Court merely omitting non-applicable language from the OUJI version, and we find no error thereby. Second, Hospital did not request a "clear and convincing" instruction to be given, and Hospital's requested instruction [14] did not ac-

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> Fraud;
> Oppression;
> Gross negligence;
> Malice (actual or presumed);
> Evil intent;
> Reckless and wanton disregard of another's rights;
>
> as defined herein, then you may, in addition to actual damages, grant Plaintiff, (name), exemplary damages in such sum as you reasonably believe will punish Defendant, (name), and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the Plaintiff, (name), but as punishment to the Defendant, (name), and as an example to others to deter them like conduct.
>
> In no event should the exemplary damages exceed ————.

OUJI-Civ. No. 5.5.

[14] Hospital's requested instruction on burden of proof for punitive damages directed that "punitive damages may be imposed only where the evidence plainly shows oppression, fraud, malice or gross negligence."

curately state the law.[15] The punitive damage instruction given by the Trial Court appears otherwise free of fundamental error,[16] and we find no error as alleged in this proposition.

As to the Trial Court's instruction on res ipsa loquitur, we likewise find no error. Under that doctrine, negligence may be inferred from the mere happening of an accident upon a showing that (1) the injury-causing instrumentality was under the exclusive care and control of the defendant and (2) the event causing the injury was of a kind which does not ordinarily occur in the absence of negligence.[17] As we view the record, we find presentation of some expert evidence by Patient attributing cause of Patient's incisional dehiscence and attendant second surgery to the stress and strain of the unnecessary trip to the ultrasound lab which would not have occurred if Hospital patient identification procedures had been followed. Even Hospital admits a mistake in this regard. Under these circumstances, we cannot say the Trial Court erred in giving a res ipsa loquitur instruction.

In its fourth subproposition of the principal appeal attacking the award of punitive damages, and again on appeal from the order denying Hospital's motion to vacate, Hospital challenges the constitutionality of the Oklahoma punitive damage statute, arguing the statute lacks a sufficient definition of both (1) culpable conduct and (2) limits of jury discretion on the amount of punitive

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[15] *Timmons*, 653 P.2d at 914, 918 (where trial court instructs generally, and party desires more specific instruction, party has duty to request more specific instruction; "[i]f a requested instruction is objection[able] in any respect, refusal to so charge the jury with the instruction is not error.")

[16] See, e.g., *Croy v. Bacon Transport Co.*, 604 P.2d 137 (Okl. 1979).

[17] 76 O.S. 1991 § 21; *St. John's Hospital School of Nursing v. Chapman*, 434 P.2d 160 (Okl. 1967).

damages allowable, in violation of Hospital's due process rights.[18] Under this proposition, Hospital asserts the due process guarantee protects against such "grossly excessive," "severe and oppressive" damage awards.

We find the United States Supreme Court has recently discussed this issue.[19] While not addressing the more general question of "whether 'undue jury discretion to award punitive damages' violates the Due Process Clause of the Fourteenth Amendment," [20] the Supreme Court found no due process violation in a punitive damage award under jury instruction in accord with Alabama law,[21] reasoning:

> So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself deny due process. (Citation omitted.) In view of this consistent history, we cannot say that the common-law method of assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. . . . Nothing in the [Fourteenth] Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method. (Citations omitted.)
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> . . .
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> . . . The instruction . . . enlightened the jury as to the punitive damages' nature and purpose [deterrence and retribution, valid state concerns], identified the damages as punishment for civil wrongdoing of the

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[18] U.S. Const., Amendment XIV; Okl. Const., Art. 2, § 7.

[19] *Pacific Mutual Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032 (1991).

[20] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1046 (Scalia, J. concurring in judgment).

[21] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044-1045.

> kind involved, and explained that their imposition was not compulsory.
>
> These instructions . . . reasonably accommodated [defendant's] interest in rational decision making and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under [state] law in determining punitive damages is no greater than that pursued in many familiar areas of law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. (Footnote omitted.) As long as the discretion is exercised within reasonable constraints, due process is satisfied. (Citations omitted.)

Pacific Mutual Life Ins. Co., 111 S.Ct. at 1044.

As applied to the present case, we observe that the instruction given in *Pacific Mutual Life Ins. Co.* is nearly identical to that given in the instant case,[22] "enlighten[ing] the jury as to the punitive damages' nature and purpose, identify[ing] the damages as punishment for civil wrongdoing of the kind involved, and explain[ing] that their imposition was not compulsory."[23] Because the Oklahoma punitive damage statute specifically restricts such an award to cases of particularly egregious conduct for the purposes of punishment and deterrence and does not compel an award thereof in any certain case, under the U.S. Supreme Court's rationale we hold the Oklahoma punitive damage statute is not violative of Hospital's due process guarantees for lack of definition of culpable conduct or limits on jury discretion as alleged.

In a related argument, Hospital also claims that Oklahoma law unconstitutionally lacks substantive standards of review for awards of punitive damages, both at the

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[22] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1037, footnote 1.

[23] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044.

trial level and on appeal, also in violation of Hospital's due process rights. However, the U.S. Supreme Court tacitly rejected this allegation in *Pacific Mutual Life Ins. Co.*, holding only that:

> . . . [G]eneral concerns of *reasonableness and adequate guidance . . . to the jury* properly enter the constitutional calculus.

111 S.Ct. at 1043. (Emphasis added.)

Under this pronouncement, we discern no constitutional due process violation in the "grossly excessive" or "influenced by passion, prejudice or sympathy" standards of review for punitive damages employed in this state.[24] Application of both standards contemplate consideration of the *reasonableness* of the award in relation to, for example, (1) cause and extent of injury,[25] (2) the deterrence objective of punitive damages,[26] (3) the actual damages awarded,[27] (4) net worth of the defendant,[28] and (5) the nature and egregiousness of defendant's con-

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[24] See, e.g., *Buzzard v. Farmers Ins. Co.*, 824 F.2d 1105 (Okl. 1991); *Chandler v. Denton*, 741 P.2d 855 (Okl. 1987); *Timmons*, 653 P.2d at 915.

But cf., *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1045, footnote 10.

[25] See, e.g., *Hobbs v. Watkins*, 481 P.2d 746 (Okl. 1970).

[26] See, e.g., *Buzzard*, 824 P.2d at 1116 ("[T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.'").

[27] *Chandler*, 741 P.2d at 868 ("In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.")

[28] *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d at 518. See also, *Basden v. Mills*, 472 P.2d 889 (Okl. 1970) (in absence of evidence of defendant's net worth, remittitur of punitive damages ordered).

duct,[29] standards implicitly recognized as proper for consideration by the United States Supreme Court.[30] The Trial Court undertook a review of the punitive damage award under the same standards as this appellate court on Hospital's motion to vacate and, contrary to Hospital's allegations, we hold the standards of review applied meet due process safeguards.

Hospital also asserts invalidity of the award as contrary to the constitutional prohibitions of excessive fines.[31] As before, we find Hospital's allegation of violation of the excessive fine prohibition controlled by U.S. Supreme Court decision.[32] In that case, the Supreme Court held:

> . . . [T]he Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide . . . that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purpose and concerns of the Amendment, as illuminated by its history.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2914.

The U.S. Supreme Court reasoned that the Constitutional drafters intended the Excessive Fines Clause to

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[29] *Timmons,* 653 P.2d at 915 (Okl. 1982) (punitive damages held "partially the result of the combined impact of the several wrongful and willful acts of the defendants and combined effect of these items of evidence influenc[ing] the jury . . . [and] creat[ing] an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct.")

[30] *Pacific Mutual Life Ins. Co.,* 111 S.Ct. at 1044.

[31] Okl. Const., Art. II, § 9. See also, U.S. Const., Amendment VIII.

[32] *Browning-Ferris Industries of Vermont v. Kelco Disposal,* 492 U.S. ——, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

prohibit excessive payments to "a sovereign as punishment for some offense," and to "plac[e] limits on the powers of the new government." [33] Applying this reasoning to the instant case, and considering the identity of language in the Eighth Amendment to the U.S. Constitution and Art. II, § 9 of the Oklahoma Constitution, we are similarly persuaded that the Oklahoma Constitutional drafters expressed the same intent to restrict the powers of state government, and did not propose by Art. II, § 9 to limit damage awards in disputes between private individuals. We therefore find the Excessive Fines Clause of the Oklahoma Constitution inapplicable to this controversy.

In its fifth subpropostion, Hospital alleges immunity from liability for punitive damages as a "not-for-profit," tax exempt corporation. However, and notwithstanding any tax exemption to which Hospital might be entitled for its "charitable" works,[34] such corporations enjoy *no* immunity "from liability for torts by reason of any exemption accorded them." [35] We therefore reject Hospital's claim of immunity from punitive damages.

In a related argument advanced both in the principal and consolidated appeal, Hospital asserts improper argument of Patient and counsel inflaming the jury. By this argument, Hospital maintains Patient should not have been allowed to give an opening statement *pro se*. Hospital also claims Patient's counsel, throughout the trial, repetitively and improperly employed prejudicial remarks and argument to inflame the jury and inflate Patient's damages award.[36] However, we find no reversible error

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[33] *Browning-Ferris Industries of Vermont*, 109 S.Ct. at 2915.

[34] 26 U.S.C.S. § 501(c)(3) (Lawyer's Co-op, 1992).

[35] *Gable v. Salvation Army*, 186 Okl. 687, 100 P.2d 244 (Okl. 1940).

[36] Hospital variously complains that counsel improperly (1) "harped on the theme of [Hospital] as an unfeeling, impersonal cor-

arising from Patient's *pro se* opening statement.[37] Nor do we find any reversible error arising from counsel's alleged prejudicial remarks,[38] to the vast majority of which Hospital failed to object at trial,[39] and we cannot say the remarks rise to the level of plain error as Hospital avers.[40] We therefore reject these allegations.

Hospital also claims improper consideration of Hospital's net worth leading to an inflated and excessive punitive damage award. In this allegation, Hospital argues "the verdict was excessive due to bias on the part of the jury because its members knew [Hospital] had a 'deep pocket.' " [41] However, Oklahoma law has consistently allowed consideration of a defendant's net worth for purposes of assessing punitive damages.[42]

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poration," (2) confused the jury with his imprecise "per diem" and other suggested mathematical means of calculating Patient's damages, (3) asked the jurors to "to identify [Patient] with the general community and . . . to place themselves in the position of [Patient]," and (4) interjected argument into the voir dire process.

[37] See, e.g., *Funnell v. Funnell*, 737 P.2d 105 (Okl. 1985); *Jefferson v. British American Oil Producing Co.*, 193 Okl. 599, 145 P.2d 387 (1944); *Rourke v. Myers*, 184 Okl. 46, 84 P.2d 639 (1938); *Oklahoma State Bank of Ada v. Mitchell*, 179 Okl. 567, 66 P.2d 920 (1937).

[38] Judgment will not be reversed for improper argument of counsel unless it is clearly shown that improper remarks influenced the verdict. See, e.g., *Middlebrook v. Imler, Tenny & Kugler, M.D.'s, Inc.*, 713 P.2d 572 (Okl. 1985); *Willis v. Fried*, 629 P.2d 1255 (Okl. 1981). See also, *Mikel Drilling Co. v. Dunkin*, 318 P.2d 435 (Okl. 1957) (clear showing of prejudice required for reversal); accord, *Beck v. Day*, 178 Okl. 310, 62 P.2d 1014 (1937).

[39] See, e.g., *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230 (Okl. 1989).

[40] 12 O.S. 1991 § 2104(D).

[41] *Smith v. United States Gypsum Co.*, 612 P.2d 251, 255 (Okl. 1980).

[42] *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023 (Okl. App. 1983); *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d

In its last proposition, Hospital again complains of the size of the verdict for punitive damages as "clearly excessive" and "influenced by passion and prejudice." So, says Hospital, the punitive damages award must be reversed (or minimally) reduced by remittitur. On this issue, the Oklahoma Supreme Court has recognized:

> Punitive damages are allowed for the benefit of society as punishment. They are designed to provide a restraint upon the transgressor and to serve as a warning and example to the wrongdoer. (Footnote omitted.) A punitive damages verdict lies peculiarly within the province of the jury and it will not be casually interfered with on appeal when it is claimed to have been actuated by passion or prejudice. (Footnote omitted.) Unless the verdict appears to be *grossly excessive or the result of the jury's passion, prejudice or improper sympathy,* it will not be conditioned on remittitur. But *where an award is found so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required.*

Chandler, 741 P.2d at 868. (Emphasis added.)[43]

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at 518; *Smith,* 612 P.2d at 255; *Chowins v. Gypsy Oil Co.,* 185 Okl. 630, 95 P.2d 586 (1939); *Smith v. Autry,* 69 Okl. 28, 169 P. 623 (1918); *Willet v. Johnson,* 13 Okl. 563, 76 P. 174 (1904).

As Justice O'Connor has observed:

> . . . The 'Constitution does not require the States to subscribe to any particular economic theory.' *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 92, 107 S.Ct. 1637, 1652, 95 L.Ed.2d 67. . . . Blackstone remarked that the '*quantum,* in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's.' 4 Blackstone Commentaries *371.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2933.

And cf., *Basden,* 472 P.2d at 891, footnote 24, *supra.*

[43] See also, *Buzzard,* 824 P.2d at 1116; *Timmons,* 653 P.2d at 915.

The Oklahoma Supreme Court has directed remittitur in few cases under the "grossly excessive," "influenced by passion, prejudice or improper sympathy" standards. In *Chandler v. Denton,* the jury awarded $600,000 in actual damages and $500,000 in punitive damages. The Supreme Court directed remittitur of punitive damages in excess of $250,000, finding:

> . . . The $600,000 [actual damages] recovery . . . is . . . ample and generous. When the $500,000 punitive damages award is added to the other amounts recovered, the total verdict becomes so grossly excessive that we cannot in reason allow it to stand. In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.

Chandler, 741 P.2d at 868.

In *Buzzard v. Farmers Ins. Co., Inc.,* the jury awarded $200,000.00 in actual damages ("not an insignificant sum"[44]) for "distress occasioned by withholding a $10,000.00 insurance payment," and $2,000,000.00 in punitive damages for bad-faith breach of the insurance contract. The Supreme Court directed remittitur of $1,600,000.00 in punitive damages, finding:

> [T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.'

Buzzard, 824 P.2d at 1116.

In *Timmons v. Royal Globe Ins. Co.,* the jury awarded about $9,000 in actual damages, $25,000 for mental pain and suffering and $3,000,000 in punitive damages for

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[44] 824 P.2d at 1116.

breach of duty of fair dealing and good faith. In directing remittitur of $1,500,000.00 in punitive damages, the Supreme Court held:

> . . . [The] purpose [of an award of punitive] damages is to restrain the defendant and to deter other from the commission of similar wrongs. Upon review, such damages will not be held excessive unless it appears they are grossly so, or the result of passion, prejudice, or improper sympathy. It is the solemn and considered judgment of this Court that three million dollars awarded as punitive damages is partially the result of the combined impact of the several wrongful and willful acts of the defendants and that the combined effect of these items of evidence influenced the jury so as to create an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated. Thus the award is held not to be properly responsive to the legitimate objective of a punitive damage award, ...

Timmons, 653 P.2d at 915.

Under the direction of these cases,[45] we have reviewed the evidence and argument of counsel at trial of the in-

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[45] In *Timmons,* the Supreme Court expressed concern that the "combined impact of the [evidence] of the several wrongful . . . acts of the defendants . . . influenced the jury . . . to create an improper sympathetic response of a damages award larger than reason dictates" in reaching a conclusion for remittitur. 653 P.2d at 915. In *Buzzard,* the Supreme Court expressed similar concerns in ordering remittitur. 824 P.2d at 1116. We are likewise concerned in the instant case that the "combined impact" of (1) the evidence of Hospital's indifference to the risk of injury to patients due to misidentification and (2) counsel's impassioned argument similarly "influenced the jury . . . to create an improper sympathetic response," and resulting in a "damage award larger than reason dictates."

stant matter. We are of the opinion that the $10,000,-000.00 punitive damage award in the present case is "larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated," is "not . . . properly responsive to the legitimate objective of a punitive damage award," [46] and is "so . . . excessive that we cannot in reason allow it to stand." [47] We therefore hold the $10,000,000.00 award of punitive damages should be affirmed, conditioned on remittitur of $5,000,-000.00 thereof. If Patient fails to file such remittitur, the entire judgment on jury verdict should be reversed, and the matter remanded for new trial.

The order of the Trial Court denying Hospital's motion to vacate and judgment entered on jury verdict is therefore AFFIRMED, conditioned on remittitur of punitive damages of $5,000,000.00. HANSEN, V.C.J. and HUNTER, J. concur.

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[46] *Timmons*, 653 P.2d at 915.

[47] *Chandler*, 741 P.2d at 868.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ-86-1210

RONDA SCRIBNER, PLAINTIFF

VS.

HILLCREST MEDICAL CENTER, DEFENDANT

ORDER OVERRULING DEFENDANT'S TERM TIME MOTION TO VACATE AWARD OF PUNITIVE DAMAGES

Oklahoma punitive damage statutes are not unconstitutional in depriving a Defendant of the due process requirements of the Fifth Amendment of the United States Constitution guaranteed under the Fourteenth Amendment thereof nor Section 7, Article II, of the Oklahoma Constitution, because of the absence of meaningful standards by which Jury discretion may be controlled in determining conduct necessary for the award of such type of damages or determining the amount of damages to be awarded.

Conduct necessary for the award is set forth with sufficient precision for the Jury to make this determination. See Title 23 O. S. Section 9, 1986; Slocum versus Phillips Petroleum Co., 769 P 2d. 146, Okl. 1989, at Page

149 under the syllabus 2 notation. In addition, the Court must make a determination that this conduct meets the statutory standards before the issue of punitive damages can be submitted to the Jury. Appellate Court review is also provided for both the determination by the Court and the finding by the Jury.

As to the amount of damages, after the Court has made the determination the evidence reflects the required conduct, the award of punitive damages is limited in amount not to exceed the amount of damages awarded, unless at the conclusion of the evidence and prior to submission of the case to the Jury, the Court finds that there is clear and convincing evidence that the Defendant's conduct is that described in the statutes. Even then, the Jury is not left to a "standardless discretion", but is permitted to award damages for the sake of example to others and by way of punishing the Defendant for the conduct reflected by the evidence and for which punitive damages are permitted under the statute.

The award of punitive damages under Title 23 O. S. Section 9, 1986, is not unconstitutional as an excessive fine (or punishment) under the Eighth Amendment of the Constitution of the United States nor under Article II, Section 9 of the Oklahoma Constitution. Browning-Ferris Industries versus Kelco Disposal, 492 U.S. —— 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

Submitting evidence of Defendant's wealth on issue punitive damages is not prejudicial error. Smith versus U.S. Gypsum Co., 61 P 2d 251, Okl. 1980.

Tax exempt status under Federal Internal Revenue Code Section 501 (c) (3), does not create immunity for tort liability and its consequent punitive damages. In Gable versus Salvation Army, 100 P 2d. 244, Okl 1940, the Oklahoma Supreme Court even rejected such immunity for charitable corporations. 501 (c) (3) tax exempt status has never been the basis for immunity from tort

even in jurisdictions that historically recognize such immunity for charitable corporations.

IT IS THEREFORE ORDERED AND ADJUDGED that the Term Time Motion to Vacate Award of Punitive Damages filed by the Defendant is overruled.

Dated this 11th day of October, 1990.

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District Judge

APPENDIX C

RELEASE FOR PUBLICATION IN THE
OKLAHOMA BAR JOURNAL
BY ORDER OF COURT OF APPEALS

DIVISION 3

November 6, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

75,446—Ronda Scribner, Appellee v. Hillcrest Medical Center, Appellant and Dr. L. Khademol Reza, Defendant.

Appellant's Petition for Rehearing is DENIED.

* * *

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 6th day of November, 1992.

/s/ Robert L. Bailey
ROBERT L. BAILEY
Presiding Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Wednesday, March 17, 1993

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

75,446 (consolidated with 76,604) Ronda Scribner v. Hillcrest Center et al.
Certiorari denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Hargrove, Opala, Wilson, J.J.

DISSENT: Simms, Summers, Watt, J.J.

RECUSED: Kauger, J.

* * *

/s/ Ralph B. Hodges
Chief Justice